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ATTORNEYS FOR APPELLEE:

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**IN THE
COURT OF APPEALS OF INDIANA**

[illegible]

No. 27A05-0802-CR-81

June 10, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Brian Crist appeals an order of restitution that was made a condition of probation as part of the sentence he received following his conviction for Burglary,¹ a class C felony, which was entered upon Crist's guilty plea. Upon appeal, Crist presents the following restated issue for review: Was the restitution order improper because: (1) the amount he was ordered to pay was not supported by sufficient evidence; (2) the court did not determine Crist's ability to pay; and (3) the court ordered restitution for items not authorized by statute?

We reverse and remand.

The facts germane to this appeal are that Crist and three confederates broke into the Natural Gifts and Healing store (the store) in Marion, Indiana and stole approximately ninety percent of the store's inventory. Crist and the other three men were eventually apprehended and charged with burglary and theft. Crist pled guilty to burglary in exchange for the State's agreement to dismiss the theft charge. Crist agreed to pay restitution as a term of probation in an amount to be determined by the probation department.

In conjunction with the presentence investigation report, victim storeowner John Powell submitted a letter stating that his and his wife's lives were "utterly shattered" by the burglary. *Appellant's Appendix* at 30. He claimed that he and his wife had declared bankruptcy as a result of the impact the robbery had on their business. He also submitted a

¹ Ind. Code Ann. § 35-43-2-1 (West, PREMISE through 2007 1st Regular Sess.).

handwritten list entitled “LOSSES DUE TO BURGLARY”. *Id.* at 32. That list claimed the following losses:

STOLEN ITEMS NOT COVERED BY INSURANCE	\$69,000.00
BANKRUPTCY FEES	990.00
BANKRUPTCY TRANSPORTATION COSTS (HEARING)	50.00
LOST WAGES DURING INSURANCE INVENTORY OF ALL MERCHANDISE – 2 WEEKS	800.00
MOVING FEES AT STORE CLOSING – TRUCK RENTAL	<u>100.00</u>
TOTAL	\$70,964.00

Id.

The trial court accepted Crist’s guilty plea and entered judgment of conviction for burglary as a class C felony. The court imposed a four-year sentence, with two years to be served on probation. Without the benefit of a hearing on the matters relating to restitution, the trial court also ordered Crist to pay restitution to the victims in an amount recommended by the probation department. The court determined that Crist should pay as restitution one-fourth of the amount of loss claimed by the victims, i.e., \$17,741. The court ordered Crist to pay the restitution order in monthly installments of \$740.00.

Crist contends the trial court erred in three respects in ordering him to pay restitution. He contends first that the trial court erred in determining the amount of his payment without conducting a hearing inquiring into his ability to pay. Second, he contends there was not sufficient evidence to support the trial court’s determination regarding the amount of the

victims' loss. Third, Crist contends that some of the items for which the trial court ordered restitution (i.e., the victims' bankruptcy and moving costs) are not proper subjects for reimbursement under Ind. Code Ann. § 35-50-5-3 (West, PREMISE through 2007 1st Regular Sess.).

The State correctly concedes the first two points. As to the first, pursuant to Ind. Code Ann. § 35-38-2-2.3(a)(5) (West, PREMISE through 2007 1st Regular Sess.), "[w]hen restitution or reparation is a condition of probation, the court shall fix the amount, which may not exceed an amount the person can or will be able to pay, and shall fix the manner of performance." Thus, the trial court must first determine a defendant's ability to pay the amount of restitution ordered. *Miller v. State*, 502 N.E.2d 92 (Ind. 1986). The trial court's failure to determine on the record Crist's ability to pay restitution constitutes error. *Walsman v. State*, 855 N.E.2d 645 (Ind. Ct. App. 2006).

Concerning Crist's second challenge, the State concedes that the evidence of the victim's claimed loss in this case was inadequate to support the restitution order. "It is well settled that restitution must reflect actual loss incurred by a victim. The amount of actual loss is a factual matter which can be determined only upon presentation of evidence." *T.C. v. State*, 839 N.E.2d 1222, 1225 (Ind. Ct. App. 2005) (internal citation omitted). In this case, victim Powell submitted only a handwritten list of losses he claimed were caused by the robbery, and even the validity of those values appears to have been highly speculative and subjective in nature. We agree with the State that there is no authority holding that a victim's statement, standing by itself, is sufficient to provide a factual basis upon which a restitution order may be premised. The evidence was not sufficient.

Finally, Crist contends the trial court erred in making the victims' bankruptcy fees and moving costs part of the restitution order. The State concedes that such costs are not authorized under I.C. § 35-50-5-3,² *see Springer v. State*, 779 N.E.2d 555 (Ind. Ct. App. 2002), *aff'd in relevant part*, 798 N.E.2d 431 (Ind. 2003), but contends that Crist effectively waived the error by agreeing to pay restitution in the plea agreement. Although it is true that Crist agreed to pay restitution as determined by the probation department, his agreement in that respect did not empower the probation department or the trial court to disregard I.C. § 35-50-5-3 in determining the amount of the order. Put simply, Crist agreed to pay restitution as determined by the probation department, which was constrained by the provisions of I.C. § 35-50-5-3 with respect to the kinds of costs that may be included in a restitution order.

The restitution order is reversed and this cause is remanded with instructions to conduct a hearing for the purpose of fashioning a new restitution order consistent with the principles discussed in this opinion.

Judgment reversed and remanded.

KIRSCH, J., and BAILEY, J., concur.

² Subsection (a) of this statute provides that the trial court should base its order of restitution upon the following:

- (1) [P]roperty damages of the victim incurred as a result of the crime, based on the actual cost of repair (or replacement if repair is inappropriate);
- (2) medical and hospital costs incurred by the victim (before the date of sentencing) as a result of the crime;
- (3) the cost of medical laboratory tests to determine if the crime has caused the victim to contract a disease or other medical condition;
- (4) earnings lost by the victim (before the date of sentencing) as a result of the crime including earnings lost while the victim was hospitalized or participating in the investigation or trial of the crime; and
- (5) funeral, burial, or cremation costs incurred by the family or estate of a homicide victim as a result of the crime.